SEP 28 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-174

CITY COUNCIL OF THE CITY OF CHICAGO, AND RICHARD J. DALEY, INDIVIDUALLY AND AS MAYOR OF THE CITY OF CHICAGO,

vs. *Petitioners,*

WILLIAM COUSINS, JR., A. A. RAYNER, JR., LEON M. DESPRES, WILLIAM SINGER, GEORGE BARR McCUTCHEON, REV. JESSE L. JACKSON, REV. RICHARD A. LAWRENCE, ANDREW CROUT, ROSEMARY GULLEY, TIMUEL D. BLACK, JR., GRACIANO LOPEZ, MARGARET B. LURIE, SUSAN SCHWERIN, INDEPENDENT VOTERS OF ILLINOIS, COMMITTEE FOR AN EFFECTIVE CITY COUNCIL AND MARY LEE LEAHY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF OF THE PETITIONERS.

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The respondents, in their brief in opposition, make several misstatements which we believe should not be permitted to go uncorrected. These are:

(1) On page 2 of their brief in opposition, respondents state that defendants presented "[o]ne witness and almost no documentary evidence." The fact of the matter is that the defendants presented five witnesses: Alderman Thomas E. Keane, Alderman Paul T. Wigoda, Alderman Claude W. B. Holman and Commissioner of Development and Planning and of Urban Renewal Lewis W. Hill (the depositions of these four witnesses were taken in open court in the presence of the trial judge (App. 77-119); (Add. App. 1-348) and subsequently were incorporated in the record by order of court (Add. A. 1)) and Edwin J. Bell (A. 493-525a; Add. A. 701-738). And, indeed, on page 11 of their brief in opposition, respondents unguardedly state "Alderman Keane testified." The defendants also introduced as an exhibit the complete 716 page transcript of proceedings before the City Council subcommittee that compiled the draft of the reapportionment ordinance; that transcript was also filed in the reapportionment case in which equality of population of the wards was in issue, *Skolnick* v. *Mayor and City Council of Chicago* (N. D. Ill., No. 66 C 2134) and was part of the record on appeal in that case (7 Cir., No. 18878). In addition, the defendants produced maps, overlays, census figures, statistical analyses and lists of aldermanic candidates, with indications of their race. See, for example, the large color map of the City of Chicago, showing on one map both the 1970 census tracts, with the population of each, and the ward boundaries under the 1970 ordinance (Add. Book of Exhibits).

(2) On page 3 of their brief in opposition, respondents attempt to belittle the findings of the District Court because it in large measure adopted the findings proposed by the defendants. Respondents neglect to state that these findings were not retyped because the case was being heard on an emergency basis, at plaintiffs' request, and plaintiffs had informed the Court that they strongly desired

to file their notice of appeal at the earliest possible moment. Nor is it error for a trial court to adopt, even *in toto*, the findings proffered by one of the litigants, and none of those offered by the other parties, if the court concludes that the findings it is adopting are correct.

(3) On page 6 of their brief in opposition, respondents state that there was testimony that the students' map was "surreptitiously used by Alderman Keane at official sessions of the City Council at which the new ward boundaries were officially drawn." There is no evidence of that in the record. Nor did the Court of Appeals find that Alderman Keane "perjured himself in this case," as respondents claim (p. 6).

(4) On page 8 of their brief in opposition, respondents argue that certiorari should not be granted because "[s]uch review would necessarily be without the benefit of a reliable trial court opinion, since the Court of Appeals concluded that the trial court's findings in many crucial areas were 'clearly erroneous,'" etc. The correctness and completeness of the District Court's opinion are issues for review. Respondents thus assume as established precisely what is in dispute.

(5) On page 9 of their brief in opposition, respondents affirm that "petitioners have repeatedly misrepresented plaintiffs' position as seeking a ward reapportionment plan in which the proportion of the wards which are composed of populations which are majority-Black or majority-Puerto Rican equals the Black or Puerto Rican proportion of Chicago's total population (Petition 12). That is not and has never been the plaintiffs' position." Yet it was in their abortive attempt to prove that blacks and Puerto Ricans enjoy majority status in a disproportionately low number of wards that plaintiffs presented the expert opinion on probability of Paul Meier, a professor of statistics

(A. 209-229). See also the testimony of plaintiffs' demographer, Pierre de Visé (A. 188-190).

(6) On page 10 of their brief in opposition, respondents concede that the correct rule of law is, as stated on page 7 of our petition, that "there is no principle requiring a minority racial or ethnic group to have any particular voting strength reflected in the legislative districting." Therefore, since the plaintiffs' case, as originally conceived and in large measure tried, was based on the proportional representation theory, and since the majority opinion of the Court of Appeals in fact adopted the proportional representation theory in holding that departure from equal proportion constituted evidence of purposeful discrimination, respondents' repudiation of the proportional theory, which it once espoused, is tantamount to a confession of error and constitutes, in itself, sufficient reason for granting certiorari.

(7) On page 9 of their brief in opposition, respondents also declare that "the theory of plaintiffs' case was that purposeful minimization of racial and ethnic voting strength had occurred in establishing the new wards." This theory requires an actual minimization of such voting strength. But, even if, assuming *arguendo* only, there was a purpose to minimize, the record establishes that no minimization was effected. As stated on page 20 of our petition for certiorari, the total population of the City of Chicago, as shown by the 1970 census figures available at the time the ordinance was enacted, was 3,329,090, the goal of the reapportionment was to draw wards each containing 1/50 of that number, or 66,582, the reapportionment was found by both the District Court and the Court of Appeals to approach that goal very closely, Chicago had at that time a black population of 1,102,620, or 32.7% of the total population, in 15 of the 50 wards the majority of the residents are black, these 15 wards elect 30% of the city's aldermen—

a difference of 2.7% between the proportion of the city's population that is black and the proportion of the wards in which a majority of the residents is black—and, of these 15 wards, 14 elected black aldermen and one re-elected a white incumbent, respondent Alderman Despres. Clearly, no actual minimization of black voting strength was effected by the Chicago reapportionment ordinance.

(8) On page 10 of their brief in opposition, respondents state that "the petitioners explicitly recognize that the Court of Appeals applied the correct rules of law in this case," quoting from page 7 of our petition for certiorari. This is absolutely untrue. The quotation used by respondents has been taken out of context. In our statement of the case, we endeavored to indicate (Petition, pp. 7, 8) the inconsistencies of the majority opinion, which begins by disavowing the proportional theory, but concludes by in effect adopting it. The petitioners do not concede that the Court of Appeals applied the correct rules of law in this case. On the contrary, the majority opinion of the Court of Appeals fell into several serious errors of law. That is what this petition for certiorari is about.

(9) On page 11 of their brief in opposition, respondents bluntly state, "Keane lied." Even if, presuming *arguendo* only, Keane was in error in thinking that population was the "sole basis" of the reapportionment, it does not follow that "Keane lied." The respondents failed to recall Keane to the witness stand for further cross-examination; respondents made no attempt in the trial court to attack Keane's credibility.

(10) On page 11 of their brief in opposition, respondents deny that the Court of Appeals decided this case on the basis of the motives of individual legislators. Of the 27 pages of the majority opinion, 14 pages (Appendix B, pp. B8-B20, B24, B25) are devoted to an attempted analysis

of the motivation of two legislators, Keane and Wigoda, and are indeed almost entirely a query into the motivation of Alderman Keane, who, no matter how influential, was only one alderman out of 50.

(11) On page 12 of their brief in opposition, respondents gracelessly state, "The petitioners seek to mislead this Court into thinking that there was substantial conflicting evidence introduced at trial." The respondents err in stating there was no conflicting evidence. Respondents' star witness, Taylor, one of the student interns, was contradicted by the other two student interns—by Kazemek, who was called by the plaintiffs (A. 663-707; Ad. A. 754-765), and by Mrs. Eme, who was a Court's witness (A. 707-747; Ad. A. 766-780). Taylor was also contradicted by defendants' witness, Bell (A. 493-525a; Add. A. 701-738). Taylor, Kazemek, Mrs. Eme and Bell were the only witnesses who testified concerning any remarks allegedly made by Aldermen Keane and Wigoda concerning the students' map. Alderman Hoellen's testimony concerning a comment he claimed was made to him elsewhere by Alderman Wigoda (A. 120-124; Ad. A. 297-338) was expressly contradicted by Wigoda (Ad. A. 338-348).

(12) On page 13 of their brief in opposition, respondents state, "[T]he Court of Appeals at B7-B13 and B14-B20 extensively reviewed not only Mr. Taylor's testimony but also corroborative testimony of at least ten other witnesses, one of whom was petitioners' witness." That is untrue. Taylor was corroborated by no one; he was contradicted by three witnesses. Murray, the only other witness testifying about the student map (A. 625-662), had no personal knowledge of any prejudicial remarks alleged to have been made by any member of the City Council. As for witnesses concerning anything other than the students' map, Alderman Hoellen, a minority member, was, as already stated, sharply contradicted by Alderman Wigoda.

Plaintiff Alderman Despres (A. 126-149; Ad. A. 349-369) testified to his personal opinion (A. 135) that the ward lines were drawn on racially discriminatory lines. Despres also stated in general terms (A. 144, 145) that the aldermen were acutely aware of the racial composition of the city and testified, conclusorily and self-servingly, that that subject "preoccupies aldermen almost pathologically" (A. 145). Plaintiff Alderman Cousins who also testified (A. 221-258; Ad. A. 464-555), outlined the racial distribution of the population of Chicago and bore witness to the unequal opportunities for housing he said are afforded blacks in the city. He testified to certain predominantly black census tracts being taken out of one ward and replaced by predominantly white census tracts, but his recollection was contradicted by the transcript of the proceedings in the City Council. Cousins also said Alderman Keane had remarked to him that he (Cousins, a black) would not want territory with a predominantly Polish population in his ward—obviously a judgment of practical politics and not a racist expression. The other witnesses for plaintiffs were either parties—intervenor Mrs. Leahy (A. 783-804; Ad. A. 828-833), who testified that the regular Democratic organization had taken its own census of her precinct—or statisticians (Meier) or demographers (de Visé, Hauser, Guard) or political candidates or activists (Lopez, Rubin Singer, Rose, Simpson) or law clerks working for plaintiffs' counsel (Matyola), who testified to the racial distribution of the population of Chicago, the probability of achieving proportional representation for blacks, Puerto Ricans and "independents" in the City Council, and the drawing of possible alternative ward maps. None of the witnesses offered any evidence of purposeful racial gerrymandering. On the contrary, plaintiffs' expert witness on demography, Pierre de Visé, candidly stated (A. 188):

"I do not think that race was a major consideration. I think that the major consideration was probably the retention of the old wards."

(13) On page 15 of their brief in opposition, respondents endeavor to explain away the obvious crudity of the students' map by attributing that to its being "based upon the incomplete census data available at the time it was being drafted." The fact of the matter is that the students' map was crude, not because it was based on incomplete census returns, but because it woefully failed to achieve equality of population of the wards, on the basis of the incomplete census returns. Far from achieving the goal of 50 wards as nearly as possible mathematically equal in population on the students' map the most populous ward was their 17th with 77,826 and their least populous ward was their 45th with 54,946—a spread of 22,880—more than one-third of the students' median of 66,400. This is hardly mathematical equality. In contrast, on the official ward map adopted by the City Council, there is a spread of no more than 9/10ths of one percent between the most populous and the least populous ward.

CONCLUSION.

In view of the inability of the respondents to address themselves to the issues presented in the petition without grossly distorting the record, the need for plenary review by this Court of the majority opinion below is indisputable. Indeed, petitioners suggest that summary reversal is now in order.

Respectfully submitted,

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